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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

**NO. 75-309**

**FRANK N. ALIOTO, et al.,**
Petitioners,

v.

**WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,**
Respondents.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Ninth Circuit

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Respondents Western Addition Community Organization, et al., file this Brief in opposition to the Petition for Writ of Certiorari and pray that the Writ be denied.

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## QUESTIONS PRESENTED

1. Whether the continuing eligibility of some unspecified number of minority persons for the Civil Service position of H-2 Fireman in San Francisco and the possibility that one or more of these persons might seek such appointment present a continuing controversy on the constitutionality of the District Court's November 19, 1973 Order.

2. Whether, in light of the continuing jurisdiction of the District Court, the appellate decision below is in direct conflict with decisions of this Court on mootness.

## STATEMENT OF THE CASE

In June of 1970, Respondents and plaintiffs below initiated a class action suit in the District Court against Petitioners and defendants below. Respondents, who brought the action under 42

U.S.C. §§ 1981 and 1983, claimed that the pre-employment selection procedures, and specifically the written examination, used by the San Francisco Fire Department were illegally discriminatory against minority candidates for the H-2 Fireman position; a second claim was that Petitioners were violating the due process and equal protection rights of the Respondents under the Fourteenth Amendment to the United States Constitution.

Numerous memoranda of decisions, orders and supplemental orders issued during the next forty months, i.e., prior to November, 1973. (See reported cases at 330 F.Supp. 536; 340 F.Supp. 1351; and 360 F.Supp. 733. Also see orders not officially reported in the Commerce Clearing House topical reporter of Employment Practices Decisions (hereafter "E.P.D.") at 4 E.P.D. ¶ 7663, p. 5604, and 5 E.P.D.



¶ 7970.) During this time period, the District Court (1) repeatedly rejected as inadequate or improper Petitioners' efforts to justify or redeem their pre-employment procedures and (2) exhorted them to comply with prior orders and to cease discriminatory conduct. While the District Court enjoined the Petitioners from using certain specific discriminatory and non-job-related written selection devices, it never stopped the Petitioners from hiring. In fact, the District Court continually urged the Respondents to begin filling vacancies then accruing in the Fire Department. Despite the absence of an injunction against hiring, the Petitioners chose to refrain from hiring and almost two hundred vacancies accrued in the Fire Department.

In November of 1973, the District Court ordered the Petitioners to begin

hiring, and to do so in a non-discriminatory fashion, from among 500 or so applicants then deemed minimally qualified according to existing Civil Service procedures (369 F.Supp. 77 and Petitioners' Appendix C). Specifically, the Court decreed that appointments should proceed in a ratio fashion, with one qualified minority appointed for every qualified non-minority appointed until further order of the Court or until the list of qualified minorities was exhausted. The District Court reserved further jurisdiction to review the Petitioners' future validation efforts, to consider the continuation or termination of the interim ratio-hiring procedure, and to make further orders as necessary regarding compliance and affirmative relief.

Petitioners were unsuccessful in their request for a stay of the Order



from the District Court. Petitioners and two sets of intervenors below then appealed to the Court of Appeals for the Ninth Circuit, claiming the interim ratio-hiring procedure was violative of the Constitution and Title VII of the 1964 Civil Rights Act. Respondents cross-appealed regarding the duration and adequacy of the interim relief.

The Petitioners did not seek a stay of the District Court's Order from the Ninth Circuit, and did not seek expedition of the appeal for some eleven months and until after Respondents had moved for expedition and the Ninth Circuit had granted same[1].

During the pendency of the appeal,

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1 The Court of Appeals per Judge Chambers granted Respondents' motion for an expedition of hearing on November 15, 1974. Eleven days later, on November 26, 1974, Petitioners filed papers indicating they were joining in the expedition motion.

the Petitioners acted to comply with that part of the District Court's order with respect to hiring. By September, 1974, they had appointed or had offered appointment to all of the minorities on the Civil Service eligibility list for H-2 Fireman. In total, there were 110 minority eligibles among a pool of 490. The Respondents moved the District Court to order the beginning of a new testing process and an extension of the ratio-hiring scheme. The District Court considered these matters and, on November 23, 1974, issued an order (supplemental to its previous order of November 19, 1973)(see Petitioners' Appendix D). Respondents' motion was in greater part denied as untimely. However, the Court ordered the Petitioners to present a proper validation study by January 31, 1975, or alternatively to have completed a new selection



process and have available a new, integrated pool of eligibles by that same date. The Court also permitted the Petitioners to begin making appointments to the Fire Department from the residual pool of eligibles.

In response to that September, 1974 order, Petitioners voluntarily elected to embark on a new validation study for their written examination. Having completed that study, the Petitioners moved for approval to use the exam without restriction in the next hiring process. Respondents are cpposing this motion, and have filed a cross motion seeking final adjudication and affirmative relief. To date, voluminous briefing has occurred and is still continuing in this matter. Initial oral argument is scheduled for December, 1975.

On March 27, 1975, the Court of Appeals, after a January hearing, rendered

its per curiam opinion, declaring the Petitioners' appeal to be moot, and affirming the District Court's November, 1973 decision and order (Petitioners' Appendix A). Petitioners' request for re-hearing and suggestion for re-hearing en banc were denied and rejected, respectively, on May 30, 1975 (Petitioners' Appendix B).

## REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioners seek a Writ of Certiorari on the grounds that (1) the matters which they raised in the Court of Appeals are not moot because there are persons prospectively affected by the order of the District Court from which the appeal was taken; and (2) because of a "conflict" with the decisions of this Court on mootness. Petitioners do not assert that there is any conflict among the Circuits. We submit that certiorari should be denied because (1) there are presently no



persons directly affected by the Court's order at this point; (2) the state of the record, and the pendency of further District Court proceedings based on a factual context different from that before this Court or the Court below, render certiorari inappropriate; and (3) the decision sought to be reviewed is not in conflict with decisions of this Court on mootness.

### A. The Continuing Existence of a Civil Service Eligibility List for H-2 Fireman Does Not Present a Factual Situation in Which the Rights and Obligations of the Parties Under the District Court's November, 1973 Order Are Still Operative.

Pursuant to the District Court's November, 1973 order, the Petitioners created an eligibility list for H-2 Fireman and, commencing in January, 1974, proceeded to offer appointments to listed candidates as vacancies in the Fire Department arose. In compliance with the challenged

portion of the order, offers of employment to minority eligibles occurred at an accelerated rate so that, by August, 1974, the minority presence on the eligibility list was exhausted in that all minority candidates had been offered appointments. It was based on this progression of facts and this understanding of the concept of "exhaustion" that the Circuit Court below concluded,

> Since the District Court's Order has been fully effected, however, no decision that we could now render as to the Order's constitutionality could alter the parties' rights and obligations under the Order. (514 F.2d 542, Petitioners' Appendix A.)

The Ninth Circuit's analysis and conclusion comports with the position taken by the District Court subsequent to August, 1974. In a September 23, 1974 order responding to a motion by Respondents and plaintiffs below, Judge Sweigert stated:



> This motion is premature because there are now no minority eligibles on the present Civil Service list -- all of the 118 minority eligibles on the list having already been given expedited (1 for 1 ratio) appointment by the Civil Service Commission -- some waived appointment) [sic] in compliance with this Court's order of November 19, 1973; all eligibles now remaining on the list happen to be non-minority (white) . . . . (Petitioners' Appendix D.)

While, to the Respondents, the analysis and recitation of facts by both Courts below seems logical and persuasive and dispositive of this point, Petitioners attempt to create or resuscitate a controversy through elevating the Civil Service waiver procedure and its effects[2] to the status, literally, of a federal question.

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2 Petitioners argue that a number of minorities offered accelerated appointment waived that right and, under the waiver procecure, may still gain appointment on an accelerated basis. The record in the Court of Appeals was devoid of evidence of this possibility, and even of specific evidence of the numbers and ethnic origin of those who had waived.

The procedure, which is authorized by local Civil Service Regulations, Rule 14, permits a candidate offered appointment to a Civil Service position to waive, on a one-time basis, that initial offer of appointment; if, at a later time while the list is still in effect, the candidate decides to lift that waiver, he may do so and thereby become eligible for a subsequent vacancy, if any. This waiver procedure considerably predated, and was in no way embraced by, the District Court orders at issue here. It was the Petitioners themselves who, acting independently of the District Court, decided that the waiver procedure was available to minorities who had rejected offers of accelerated employment.

Consequently, the existence or nonexistence of one or more minority eligibles for H-2 Fireman who have waived



initial appointment and who may or may not lift that waiver and thereby may or may not gain some advantage over white eligibles not yet offered appointment is an issue (or potential issue) born of the normal operation of local Civil Service rules and not of the subject order.

### B. Even If Those Minority Candidates on Waiver Could Be Said To Be Capable of Claiming a Right Under the November 19, 1973 Order, There May Well Be No Continuing Controversy At The Present Time, And There Is An Extreme Likelihood That No Controversy Will Exist Before Hearing Can Be Held, Either In This Court or In The Court of Appeals.

As noted in the opinion of the Ninth Circuit (Petitioners' Appendix A), when the issue of mootness was raised during oral argument, the Petitioners claimed that this possibility was foreclosed by the presence on the hiring list of some minority applicants who might possibly seek appointment as firemen. Other than

these statements, the record is devoid of any factual basis to support the Petitioners' argument. In their Petition for Certiorari, they try to further buttress the mootness defense by claiming that there are ten minority eligibles presently under waiver. Respondents hold serious reservations as to the accuracy of that bald claim. Moreover, even if, for purposes of argument only, it is conceded that some right eminating from the 1973 District Court order could still attach to any minority eligible under waiver, the critical question remains: do any such rights presently, or prospectively, attach?

The Petitioners, after complying with the subject order, proceeded to make further appointments to the Fire Department under the authority of the "emergency" appointment provisions of the District



Court's September 23, 1974 supplemental order (Petitioners' Appendix D). As of the present time, Respondents are informed, the Petitioners have appointed or offered appointment to all white candidates on the eligible list who ranked at number 305 (the three-hundred-and-fifth) or higher. The numerical ranking system just referred to is not one which Petitioners contest, or one which was created or ordered by the District Court. Respondents believe that substantially all, if not all, of the eligible minorities under waiver hold ranks higher than 305. If this is the case, then the right of any eligible minority to lift his waiver and seek appointment is independently based on his ranking as determined by regular Civil Service procedures and not as based on any rights accrued pursuant to the challenged order.

Also, again conceding for purposes of argument that some "accelerated" right to appointment remains from the challenged order, there is an extreme likelihood that the present list of eligibles (including any minorities and all Whites) will be exhausted in the immediate future. Due to a change in the salary structure and working hours of the Fire Department approved by the electorate on November 4, 1975, the Chief of the Fire Department estimates "at least 350" firemen will retire between now and June 30, 1976. (See Appendix A, which is a reproduction of a newspaper article in the San Francisco Chronicle of November 6, 1975, detailing this development.) This number of vacancies will cause all persons on the present eligibility list to be offered appointments and a wholly new hiring process to start. Under these facts, there



can be no conceivable claim that any white eligible has been denied an appointment because of the challenged order.

### C. The Continuing Jurisdiction of the District Court Does Not Place the Decision of the Ninth Circuit in Direct Conflict With the Decisions of the Supreme Court on Mootness.

As argued supra, there presently exists no live controversy or possibility of such controversy on the record before the Ninth Circuit. However, Petitioners make a second claim: Petitioners urge that, because the District Court has retained some form of jurisdiction in this matter and because there is a possibility that a new ratio-hiring order might issue, the order appealed from represents a continuing controversy. This position is without merit.

The possibility that the District

Court will act in the same way and for the same reasons is highly speculative. The Petitioners appealed from the imposition of a temporary ratio-hiring order carefully circumscribed in duration and particularly tailored to the factual context then before the Court. It was the form and nature of the particular type of affirmative relief granted, and not the substantive decision or the principle of affirmative relief, which the Petitioners challenged. It is sheer conjecture now to state, as Petitioners do, that because the District Court has continued supervisory jurisdiction over the administration of the remaining portions of relief, and because the Petitioners may fail to satisfy the legal standards which the Court has articulated for them[3], the District Court

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3 As noted in the Statement of the Case, the District Court in September of 1974 gave the Petitioners, defen- [continued]



will (upon Petitioners' potential failure) choose to order ratio-hiring relief from among the varied arsenal of affirmative measures in the equitable discretion of a trial judge hearing employment discrimination issues, and will do so on the same grounds previously articulated. Moreover, while Respondents feel some form of further affirmative relief is appropriate in the District Court, the Petitioners' argument ignores the fact that the District Court in this case has repeatedly expressed its reservations about the advisability, if not the legality, of even temporary ratio-hiring orders. In his most recent order, Judge Sweigert even took the position that if Petitioners' new validation efforts were successful, this

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3, (cont.) dants below, the option of commencing a new selection process for fireman or attempting a new validation effort for their pre-employment process to show its job-relatedness. The Petitioners themselves chose this latter option.

"would make any future ratio order unnecessary" (Petitioners' Appendix D).

This Court has repeatedly stated that it and the lower courts have the power to act only in the context of a justiciable case or controversy, and thus lack jurisdiction to review moot cases. See, for example, S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972); Benton v. Maryland, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969); and Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964). As recently as June of this year, this Court, quoting with approval from North Carolina v. Rice, 404 U.S. 244, 246 (1971), stated that federal courts do not have power "to decide questions that cannot affect the rights of litigants in the case before them." Preiser v. Newkirk,



__ U.S. __, 95 S.Ct. 2330, 2334, __ L.Ed. 2d __ (1975). Decision by the Ninth Circuit on the matters in the record before it would not have had and, even more clearly in a prospective context, will not have, an effect on the rights of litigants. The order appealed from has already been complied with and, even under the most tenuous of analyses, will have ceased having any effect in the immediate future.

There is, of course, an exception to the general rule on mootness to cover cases which, by their very nature, would always be terminated before the underlying rights could be heard on appeal. i.e., matters "capable of repetition yet evading review", Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 31 S.Ct. 279, 55 L. Ed. 305 (1911). As Professor Moore has written,

[i]n such cases a strict ad-

> herence to the requirements of a present controversy would leave plaintiff always suspended between prematurity and mootness. (6A J. Moore, Federal Practice, 57.13 (2d ed., 1974).)

This Court has applied this exception in Roe v. Wade, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), which challenged the constitutionality of an anti-abortion statute, and to a number of cases which attached election rules and procedures, including Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, el L.Ed.2d 274 (1972); Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). See also Sosna v. Iowa, __ U.S. __, 95 S.Ct. 553, __ L.Ed.2d __ (1972). This exception does not apply to the present case, The issues raised in this appeal are not of the type which, by their very nature, would never be definitively settled on appeal. Quite the contrary, in the event that the District Court should again order ratio hiring, Petitioners could immediately appeal, if necessary, seeking the appropriate stay, and have the decision reviewed[4].



> D. The Exercise of the Court's Certiorari Jurisdiction and Even an Order Causing Entertainment of the Merits in the Ninth Circuit Would be Inappropriate in the Present Posture of This Case.

As set forth in the Statement of the Case, there have been further proceedings in the District Court since the order from which the Petitioners have appealed. While the appeal was pending, the Petitioners, as discussed supra, complied with the challenged provision of the order and the Respondents unsuccessfully moved for an extension of the order and for further

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4 This would have been the case here had the Petitioners sought from the Court of Appeals a stay of the District Court's order, or sought upon filing an expedition of the appeal. Of course, as noted supra, Petitioners did, eleven months after filing, join in Respondents' motion for expedition after it had been granted.

equitable relief. Subsequent thereto, the Petitioners made a wholly new effort to establish the job-relatedness of their pre-employment test and sought court approval therefore. Respondents have filed papers objecting to that validation effort and, in part, based on the claimed inadequacies of this validation effort, have moved for prohibitory and affirmative equitable relief. With the single exception of the District Court's order of September 23, 1974, none of these developments or the substantial new evidence involved are in the record before the Ninth Circuit. Finally, the District Court has not yet heard oral argument or rendered decision on these issues, and is not likely to do so until 1976. If the District Court approves the Petitioners' latest validation effort, concommitantly rejecting Respondents' motions, further



review of Petitioners' appeal will become pointless, because Petitioners cannot claim that they have been ordered to do anything. Review in the Ninth Circuit would, in these circumstances, involve abstract questions and an advisory opinion. On the other hand, if the District Court should disapprove of the validation effort and/or grant Respondents' motions for affirmative and prohibitory relief, there would be time enough for Petitioners to seek a stay of the proceedings pending appeal of the final order; review could then proceed on a complete and current evidentiary record. This Court's certiorari jurisdiction should not be exercised on a stale record, and likewise should not be exercised to cause hearing on a stale record where the only live issues are distinct from those on appeal and are still pending before the District Court.

## CONCLUSION

For the reasons stated, the Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: November 12, 1975.

[APPENDIX FOLLOWS.]

# APPENDIX

San Francisco Chronicle Thurs., Nov. 6, 1975 pp. 1 & 26

# Chief Says Vote Forces 350 Firemen to Retire

*Duffy Jennings*

At least 350 veteran San Francisco fire fighters will retire by June 30 because voters approved ballot measures altering their wages and working hours, Fire Chief Keith P. Calden said yesterday.

Calden said a number of fire department officers — himself included—are considering retirement because they fear their salaries will be reduced up to ten per cent July 1 with the passage of Proposition P.

He also said that the success of Proposition Q on Tuesday's municipal ballot will bring hefty additional costs to taxpayers in overtime and administrative work to overhaul the present scheduling system.

"We worked 30 years to get this far." he said."And now it's all gone in a few hours."

But Supervisor John Barbagelata, who authored both measures in the wake of the strike by police and firemen in August, disputed Calden's predictions and said the measures will save money.

Furthermore, Barbagelata said that if he wins the job of mayor over state Senator George Moscone in their runoff election on December 11, he will fire Calden. "There will be a new chief," he said.

Proposition P, the measure setting policemen's and firemen's salaries by the average paid in California cities with populations in excess of 350,000, was approved 129,122 to 64,093.

Proposition Q, which changes firemen's wor the schedule from shifts of 24 hours to split shifts of ten and 14 hours, passed 120,153 to 71,730.

Retirement pay is based on the salary a fireman is earning at the time he retires.

Many firemen now eligible to retire—having served 25 years or more and being 50 or older—believe the enactment of Proposition P will lower their base pay next year may retire before that can happen.

It was not known whether any of the firemen filed applications yesterday, but among those considering retirement besides Calden are Deputy Chief Joseph Daly, Assistant Chief Bruno Bassi, and Bureau of Administration Chief Andrew Casper.



Fire Fighters Union President James Ferguson, who waged a tireless campaign against Q, said there are now more than 480 hosemen and officers with 25 to 30 years of service in the Fire Department.

"Close to 400 of them will go out," he predicted"The public really didn't know what they were buying. The city will never recover from this."

Ferguson said that if 350 to 400 men retire within the next seven months, the department will be forced to close a third of its 44 stations.

Unless the examination and training cycles are shortened, he added, it would three or four years before the department could regain that many men.

Meanwhile, the resulting decline in service could have a profound effect on fire insurance rates here, now among the lowest in the nation

Daniel Mattroce, secretary for the Retirement System Board, said fire department sources have told him to expect 200 to 400 retirements during the next several months.

Immediate cash payments for this many retirees would total $3.5 million, Mattroce said. He added that most of that amount has already been accrued in the system.

But Supervisor Barbagelata scoffed at Ferguson's projections and said Q will save money.

"Why would they retire?" he asked. "There's no logic to it. They go out at their highest salary anyway."

Under the 24-hour work schedul, Barbagelata said a fireman required to fill in for a sick lieutenant, say, must be paid the lieutenant's salary for 24 hours. Under the new system, the pay would be 14 hours at the most. This alone will save $350,000 a year, Barbagelata said.

The so-called 10-14 schedule, which was in effect here until 1955, poses some new problems for fire fighters, most notably that they will be required to work 18 shifts per month, double the number of shifts they now work.

This results in a doubling of commute costs, a substantial figure for many firemen who live outside the city, some as far away as 50 miles or more.

Under the 10-14 system, a typical work week for a fireman, beginning on Monday for example, would be:

Monday and Tuesday—8 a.m. to 6 p.m.

Wednesday—6 p.m. to 8 a.m. Thursday

Thursday—6 p.m. to 8 a.m. Friday

Saturday and Sunday—Off.

Calden said he has always opposed the 24-hour shift and said that"in the long run, the efficiency of the fire department will pick up" under the new system.

Meanwhile, he foresees tremendous problems in having to regulate his work force twice a day rather than once, and said it will be at least two months before the new work hours can be implemented.

For the fire fighters' part, Ferguson said, the 10-14 schedule will inconvenience firemen's families.

A man due at work by 6 p.m., he said, will have dinner at 3:30 or 4 that afternoon, while someone on the day shift won't be dining at home until 7:30 or 8 that night.



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The system could also signal an end to a firehouse tradition here: the big evening meal.

"The day crew will have some kind of lunch," Calden said, "and the night crew will probably have sandwiches and coffee."



IN THE
SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF SERVICE

I, SIDNEY M. WOLINSKY, attorney for Respondents herein, hereby certify that, on the twelfth day of November, 1975, I caused copies of this Brief in Opposition to Petitioner for Certiorari to be served on all the parties required to be served by mailing three (3) copies in a duly addressed envelope to Thomas M. O'Connor, City Attorney, and Michael C. Killelea, Deputy City Attorney, and attorneys for the Petitioners herein, 206 City Hall, San Francisco, California 94102.

DATED: November 12, 1975

Sidney Wolinsky

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